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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 254

ROCK CREEK PLAZA, INC., *Petitioner,*

v.

JULIAN H. ZIMMERMAN, Commissioner of the Federal Housing Administration, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which affirmed the order of the United States District Court for the District of Columbia, enjoining petitioner from operating as a hotel any part of its premises known as "The Woodner" at 3616 16th Street, N. W., Washington, D. C.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is reported at 164 F. Supp. 269 (App. 1a).[1] The opinion of the Court of Appeals is reported at 266 F. 2d 695 (App. 18a).

JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1959 (App. 20a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the Housing Act of 1954, 68 Stat. 610, 12 U.S.C. § 1731b, creates an indefeasible right to operate transient facilities in housing projects financed through Federal Housing Administration insured mortgage loans, where those projects had prior approval of the Commissioner of Federal Housing Administration to operate transient facilities.

STATUTE INVOLVED

Housing Act of 1954, 68 Stat. 310, 12 U.S.C. § 1731b:

> "(a) The Congress declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.

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[1] Citations to the record and appendices in this case have been abbreviated as follows:

Joint Appendix in Court of Appeals—R.
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"(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (*in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis*), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis). (Emphasis supplied.)

. . . . .

"(d) The Commissioner is authorized and directed to enforce the provisions of this section by all appropriate means at his disposal, as to all existing multifamily housing with respect to which a mortgage was insured under this Act prior to August 2, 1954, as well as to all multifamily housing with respect to which a mortgage is hereafter insured under this Act: *Provided*, That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to August 2, 1954.

. . . . .

"(f) Promptly after receipt of written notice that any portion of any building is being rented or operated in violation of any provision of this section or of any rule or regulation lawfully

issued thereunder, the Commissioner shall investigate the existence of the facts alleged in the written notice and shall order such violation, if found to exist, to cease forthwith.

"(g) If such violation does not cease in accordance with such order, the Commissioner shall forward the complaint to the Attorney General of the United States for prosecution of such civil or criminal action, if any, which the Attorney General may find to be involved in such violation.

"(h) Whenever he finds a violation of any provision of this section has occurred or is about to occur, the Attorney General shall petition the district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices; and upon a showing by the Attorney General that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

. . . .

"(j) The several district courts of the United States and the several district courts of the Territories of the United States or other place subject to United States jurisdiction, within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation shall be found, shall, wheresoever such acts or practices may have been done or committed, have full power and jurisdiction to hear, try, and determine such matter under subsections (h) and (i) of this section."

STATEMENT

Petitioner, a Maryland corporation, operates a Rental Housing Project, known as "The Woodner," in Washington, D. C. In July 1955, respondent's predecessor in office, Norman P. Mason, instituted proceedings against petitioner seeking to prohibit the use of any facilities in the project for transient purposes (R. 3). This action was commenced under § 513 of the Housing Act of 1954. On June 30, 1958, the district court rendered an opinion in which it concluded that petitioner's use of a portion of the premises for transient purposes was violative of the National Housing Act, 56 Stat. 303, 12 U.S.C. § 1743, as amended by § 10 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, 214 (R. 346, App. 1a).

Unlike the situation in *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, decided by this Court early in the October 1958 term, petitioner herein had obtained written authority from the Commissioner of FHA to operate 250 units, of a total in excess of 1100 in the project, on a transient or hotel basis (R. 233-34). This authority was granted in August 1952 when the District of Columbia zoning board declined to permit petitioner to operate certain planned commercial facilities, such as drug store, beauty parlor and dining room, unless they were adjuncts to hotel housing (R. 80-81, 171-172). This admittedly was an appropriate application of the local zoning regulations, although inconsistent with the same board's earlier approval of petitioner's construction plans wherein the commercial facilities were disclosed as apartment adjuncts.

FHA's approval, however, restricted the number of units which were to be used for transient housing, and denied to petitioner the right to advertize its hotel ac-

commodations or to employ bellboys on the premises (R. 233-34). It also sought to limit the duration for which the authority was valid. The approval was to be effective only so long as hotel or transient accommodations continued to be a prerequisite to the use of the commercial facilities by virtue of the District of Columbia zoning regulations (R. 233-34).

In 1954 the zoning regulations were amended to permit commercial adjuncts to apartment dwellings if certain conditions existed (R. 314). Thus, the necessity for hotel facilities was eliminated in certain instances in the District of Columbia.

Some time prior to the adoption of this zoning amendment, however, the Housing Act of 1954, 68 Stat. 310, 12 U.S.C. § 1731b, was enacted. This Amendment to the National Housing Act declared that it had been the intent of Congress since the enactment of the National Housing Act that housing built under that program be used principally for residential purposes, and that this intent excluded the use of such housing for hotel or transient purposes. Despite this sweeping prohibition, § 513(b) of the Amendment contained specific authorization for the operation of a limited number of hotel accommodations in instances where the Commissioner of FHA had agreed to same prior to May 24, 1954. It is within this exception that petitioner found itself, for the Commissioner had given his approval to the rental of 250 units on a transient basis in August 1952 (R. 233-34).

Aside from this, however, petitioner initially believed itself to be eligible under the zoning amendment and in November 1954 made application for permission to establish a food store as an adjunct to its apartment dwellings (R. 275).

Before the District of Columbia Board of Zoning Adjustment formally acted on this matter, petitioner determined that it was not eligible to apply for such authority under the 1954 zoning amendment and accordingly sought to withdraw its application (R. 241-42).

The instant litigation resulted when petitioner refused to comply with FHA's direction that petitioner process the necessary application with the Board of Zoning Adjustment to obtain permission for the establishment of commercial facilities as apartment adjuncts (R. 238-39). When petitioner notified FHA that it could not do so, FHA adopted the position that petitioner had violated a contract, *viz.* the authority of August 1952, and that consequently FHA was warranted in rescinding *in toto* that contract (R. 240-41). The contract being avoided, petitioner then would no longer fall within the exception to the general interdiction of the Housing Act of 1954, which permitted limited transient rentals in those instances where the Commissioner had agreed to such rentals on or before May 24, 1954.

Petitioner denied violating the terms of the August 1952 authority and denied its eligibility to qualify under the 1954 amendment to the zoning regulations. Petitioner further urged that enactment of the Housing Act of 1954 so modified the August 1952 approval that the sole limitation upon petitioner's right to rent to transients was that no more than 250 units could be devoted to that purpose. Petitioner urged that except as expressly adopted by the 1954 enactment the prior limitations on its rights were invalid, and that it was then free to operate 250 units on a hotel basis subject, of course, to FHA's control of rent schedules.

The district court upheld FHA in this matter, concluding that petitioner had acted in bad faith in refusing to make application with the zoning board, and that petitioner had advertised and employed bellboys about the premises in violation of FHA's approval. Accordingly the court upheld FHA's rescission of the August 1952 approval (R. 346, App. 1a). Petitioner was given until October 31, 1959, to discontinue its transient operations (R. 360, App. 16a). This decision of the district court was upheld on appeal by the United States Court of Appeals for the District of Columbia Circuit (App. 18a).

REASONS FOR GRANTING THE WRIT

This case presents an important question raised but not resolved by the decision of this Court in *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84. In *Darlington* this Court concluded that housing projects constructed under the provisions of the National Housing Act, 56 Stat. 303, 12 U.S.C. § 1743, as amended by § 10 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, 214, had no right or privilege to rent accommodations to transients. It was not necessary, however, there to determine whether or not FHA had authority to approve rent schedules for transients, or to determine the effect of § 513(b) of the 1954 Housing Act, 68 Stat. 610, 12 U.S.C. § 1731b, upon the approvals FHA had given prior to May 24, 1954. This is the issue raised herein.

The courts below have held in effect that the 1954 Amendment adopted in their entirety the various approvals of transient rent schedules which FHA had granted prior to the May 24 date. Thus, despite the apparent intention of Congress to permit some proj-

ects to operate as a hotel on a fully competitive basis, the holding of the courts below compels these projects to operate in accordance with the restrictive terms of the approval received from FHA. While the extent of the variations in these approvals is not known, a project such as petitioner's cannot advertise, cannot employ bellboys for the convenience of transient guests, must retain cumbersome kitchen equipment in all hotel accommodations, and must always face the prospect of losing its right to offer transient or hotel accommodations altogether. This last element serves only to discourage the making of improvements and investments designed to keep the hotel facilities on a par with competitors not so restricted.

Obviously the net result of such restrictions as were imposed upon petitioner was to jeopardize the financial position of the project because of its inability to compete freely and fairly with others in the hotel industry. While such a result might serve the best interests of privately financed hotel operators,[2] there is no support for the conclusion that it is consistent with the policy expressed by Congress in § 513(b) of the 1954 Amendment. The suggestion that Congress intended to deprive these projects of the right to make efficient and effective use of their authorized hotel accommodations is incredible.

This Court in *Darlington* expressed some question with regard to the authority of FHA to authorize rent schedules for transients. 358 U.S. at 89-90. At the

[2] Mr. Justice Harlan dissenting in *Darlington* noted that the 1954 Amendment appeared to be designed "to afford relief for private interests, as distinguished from public purposes. . . ." 358 U.S. 93, 98. Such a design appears to be further promoted by the lower courts' construction of the 1954 Act.

same time it was noted that the Housing Act of 1954 expressly gave FHA that power. 358 U.S. at 90 n. 5. What effect, however, did the 1954 Amendment have upon the prior FHA approvals?

As the law presently stands the 1954 Amendment adopted *in toto* all of the restrictive terms and conditions appearing in the various approvals. Petitioner submits this to be incorrect and maintains that only insofar as the prior approvals are consistent with the 1954 Amendment can they be deemed adopted. As pointed out above, restrictions prohibiting advertising or the use of bellboys are not consistent with the expression by Congress that certain projects may operate as hotels. Nor is the threat of losing altogether the right to so operate.

The restriction of the number of accommodations to be used, as appearing in the August 1952 approval, is expressly adopted by the 1954 Amendment. No other restriction is so adopted. This affirmative description of a single limitation appearing in the 1954 Amendment negates the existence of any other limitation upon the right to rent on a transient basis. See *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 288; *Brooks* v. *St. Louis-San Francisco Ry. Co.*, 180 F. 2d 185, certiorari denied, 339 U.S. 966.

The fact that FHA's August 1952 approval was designed to be consistent with a policy prohibiting transient rentals is not justification for a conclusion that the approval survived in its entirety the 1954 Amendment. Certainly, the terms of the various FHA approvals cannot be sustained merely because they are more restrictive than Congress' expression in the 1954 Amendment. Cf. *Charleston & W.C.R. Co.* v. *Varnville Furniture Co.*, 237 U.S. 597. Section 513(b) of

the Amendment expresses a policy contrary to that previously adhered to by FHA and as the 1952 approval is inconsistent with the most recent expression of Congress the approval must be deemed superseded. Cf. *United States* v. *Claflin*, 97 U.S. 546.

By the ruling of the courts below it appears that FHA may make a re-determination as to the necessity for a particular project to continue hotel facilities. Thus, if it be determined that a change of circumstances has transpired, such as an increase in the number of privately financed hotels or a decrease in demand for hotel facilities, the earlier approval of the use of certain facilities for hotel purposes may be rescinded. Quite obviously this was never intended by the Congress in its enactment of the Housing Act of 1954.

This case then presents the very issues not presented in *Darlington*. Upholding respondent in its contentions would be an invitation for future litigation centering about the 1954 Amendment. Moreover, the construction of the 1954 Act arrived at by the courts below flies in the face of the unambiguous expression of that statute. The importance of this question in the efficient administration of the National Housing laws is a compelling reasoning for the granting of a writ of certiorari in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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July, 1959.

APPENDIX TO PETITION

[Filed June 30, 1958]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3017-55

NORMAN P. MASON, Commissioner of the Federal Housing Administration, *Plaintiff*

vs.

ROCK CREEK PLAZA, INC., *Defendant*

MATTHEWS, *District Judge*.

This action was brought by Norman P. Mason, Commissioner of the Federal Housing Administration under Section 513 of the National Housing Act. 12 U. S. C. A. § 1731b. That section was added to the Act in 1954 as an amendment,[1] and states in pertinent part:

> "The Congress * * * declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.
>
> "Notwithstanding any other provisions of this Act, no new, existing or rehabilitated multifamily housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless * * * on or before May 28, 1954 the Commissioner has agreed in writing to the rental

[1] National Housing Act, approved June 27, 1934, 48 Stat. 1246, as amended by addition of Section 513, August 2, 1954, 68 Stat. 610, 12 U.S.C.A. § 1701 et seq., 1731b.

of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such bases) * * *

"As used in this section, * * * the term 'rental for transient or hotel purposes' shall have such meaning as prescribed by the Commissioner but rental for any period less than thirty days shall in any event constitute rental for such purposes * * *."

The Commissioner is empowered by Section 513 to enforce its provisions.

The defendant, Rock Creek Plaza, Inc., a Maryland corporation, was organized to build a multifamily housing project at 3636-16th Street, Northwest, Washington, D. C., with the proceeds of loans guaranteed by the Federal Housing Administration under Section 608 of the National Housing Act.[2] The project is owned and operated by defendant and known as "The Woodner". All of its 1135 apartments have kitchen equipment and are suitable for permanent occupancy. However, defendant has made 246 of these apartments available for rental to transients on a night to night basis.

The plaintiff seeks a permanent injunction restraining the defendant from operating its project as a hotel, from renting any of the units in the project for any term less than one month until such time as the loans have been repaid and the Federal Housing Administration insurance terminated, and from charging rent for any unit in excess of the monthly rental schedule approved by the Commissioner of the Federal Housing Administration.

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[2] National Housing Act, approved June 27, 1934, 48 Stat. 1246, as amended by addition of Section 608, May 26, 1942, 56 Stat. 303, and as thereafter amended, 12 U.S.C.A. § 1701 et seq., 1743.

Under peculiar circumstances to be related hereinafter an agreement was entered into in August 1952 between the then Assistant Commissioner of the Federal Housing Administration and defendant whereby under certain conditions defendant was given permission to use 250 apartments in its project for transient rentals.

It is contended by plaintiff that such right as defendant had to rent to transients was based solely upon the aforementioned agreement, that defendant has breached the agreement in several ways hereinafter stated, and that because of such breaches plaintiff terminated the agreement in 1955. On this premise, plaintiff maintains that defendant by continuing to rent to transients is violating Section 513 of the National Housing Act, 12 U.S.C.A. § 1731b, which prohibits transient rentals in projects on which FHA insured loans are outstanding. On the other hand, defendant denies that its right to rent to transients is dependent upon the agreement, but asserts that if it is, the agreement is still in effect and that plaintiff's attempt to terminate it is unwarranted. Further, defendant maintains that its method of operation does not violate Section 513. It is argued that prior to adoption of Section 513 in 1954 there was no reserved power in the National Housing Administration to prohibit rentals for less than thirty days, and hence that it would be violative of due process to apply the prohibitions of that Section to projects completed before its enactment (as was defendant's project). Moreover, defendant claims that Section 513 exempts from its prohibitions the hotel and transient operations of The Woodner. This claim is grounded on the clause therein concerning accommodations which prior to adoption of Section 513 had been used for hotel and transient operations with the written consent of the Federal Housing Administrator.

From the testimony, and exhibits in evidence, the court makes the following

Findings of Fact

1. In February 1949, Rock Creek Plaza, Inc., hereinafter referred to as the defendant, filed applications for mortgage insurance under Section 608 of the National Housing Act for two projects, each being described as an "eight story apartment" with over 500 "family units".

2. Commitments of insurance were executed and issued to the proposed mortgagee in March 1949 by the Federal Housing Administration, hereinafter referred to as FHA. Under the terms thereof FHA undertook to insure loans made to defendant up to the amount of $9,897,300.

3. Thereafter the mortgagee loaned to the defendant said insured sum, which moneys were to be used for the construction of two apartment projects, located at 3636-16th Street, Northwest, Washington, D. C., described as Sections I and II. The two sections are separated by a strip of caulking compound one inch wide, and the entire project, known as The Woodner, is operated as a single unit.

4. As required by FHA the defendant adopted a model charter, the terms of which were, for the most part, prepared by FHA. Under the terms of this charter, the defendant's business activities were limited to the construction and operation of rental housing projects, the text in that regard being as follows:

> "So long as any property of this corporation is encumbered by a mortgage or Deed of Trust insured by the Commissioner *it shall engage in no business other than the construction and operation of a Rental Housing Project or Projects.*" (Emphasis supplied.)

5. The charter further provided that FHA would control the rental schedules for all apartments in the project and defendant certified that "in selecting tenants

for the property" it would "not discriminate against any family" by reason of their children.

6. Numerous provisions are in defendant's charter designed to give to FHA the right to police defendant's corporate activities for the protection of FHA as guarantor of the loans and for guarding against practices inconsistent with the purposes of the National Housing Act. No attempt will be made to detail these provisions but the following one sheds light on the issues here:

> "The corporation shall not without prior approval of the holders of a majority of the shares of the preferred stock" (such holders being FHA) "require as a condition to the occupancy or leasing of any unit in the project the payment to or deposit with the corporation * * * of any amount other than the payment of the first month's rent plus a security deposit in an amount not in excess of one month's rent to guarantee the performance of the covenants of the lease."

7. Under the National Housing Act, as first enacted in 1934 and consistently thereafter, it was the interpretation of FHA that insurance was not to be issued to projects which were used in any degree for transient rentals, and FHA issued directives to its field officers, commencing in 1938, prohibiting transient rentals in FHA projects.

8. The language "designed principally for residential use" appearing variously in the National Housing Act (although not in Section 608) and in the FHA regulations was interpreted by FHA to permit the insurance of dwellings or apartments, portions of which were designed for some commercial purpose for the benefit of the occupants of such housing, including garage space, beauty parlors, grocery stores, and the like.

9. The defendant applied to the District of Columbia for an excavation permit. After it was issued and with

FHA's consent defendant commenced excavation. However, under FHA practice no advances to the contractor would be insured until the contractor produced a building permit from the local authorities, and proof that the property upon which the project was to be built was zoned for residential use.

10. When the defendant submitted its application for a permit to construct an apartment building, as required by the District of Columbia, it had furnished plans which indicated that it intended to use certain space within the building for commercial adjuncts. Under the then existing District of Columbia zoning regulations, a hotel license was required in accommodations which contained commercial adjuncts. Following the submission of the application for a permit to construct an apartment building, it was revised to show that the building was to be used for an apartment-hotel, and on or before September 26, 1949, a further application for permission to build projections beyond the property line was filed with the District of Columbia, showing that the building was to be used for an apartment-hotel.

11. Prior to the issuing of the building permit on October 7, 1949, defendant was fully apprised of the zoning requirements and intended to comply therewith by operating an apartment-hotel.

12. Under the practice of the District of Columbia, the building permit is not issued until after the various construction branches of the District of Columbia, such as plumbing, electrical, structural, etc., have approved the plans and have reflected their approval by a stamp on the application.

13. Under the practice of the District of Columbia, and in view of the plans and applications on file, a building permit for an apartment-hotel should have been issued. If such a permit had been issued, the project would have

become ineligible for FHA insurance under the existing policy and practice.

14. For reasons which are not explained, the District of Columbia issued a building permit for an apartment, even though at the time of issuance the plans had not been approved by all of the constructions branches, and showed commercial adjuncts. This permit was then presented to FHA and the loan was endorsed for insurance.

15. In December 1949, the mortgagee noted the necessity for a hotel license and assumed that defendant would take the necessary steps to secure the same. In January 1950, the defendant filed an application with the Board of Zoning Adjustment of the District of Columbia for permission to operate commercial adjuncts in the project and submitted a plan indicating an intent to make 420 apartments available for transients. This application was approved by the Board of Zoning Adjustment, and permission was granted upon the condition that a hotel license be secured. At the time of this application, the excavation had been completed to the extent of 90% in Section I.

16. Plaintiff's first indication of the defendant's intention to conduct a hotel operation came in the summer of 1951 when FHA's local director heard a rumor that defendant had hired a hotel manager. At this time the local director advised defendant that hotel facilities and services were not contemplated under the National Housing Act.

17. It was not until January 1952 when the building was nearing completion, that defendant advised FHA of the necessity of securing a hotel license, if the commercial adjuncts were to be used, and of defendant's intent to operate as a hotel. This was plaintiff's first knowledge of the District of Columbia zoning requirement of a hotel license for housing accommodations containing commercial adjuncts.

18. Plaintiff refused to permit defendant to engage in transient rentals, and this refusal persisted until August 1952. Shortly before that Franklin Richards resigned as Commissioner of FHA, and he was quickly employed by defendant to secure permission to operate as a hotel, part of his fee being contingent upon his success.

19. In August 1952, the policy of FHA against transient rentals was reversed insofar as the defendant was concerned. An agreement was entered into whereby among other things (a) the defendant was not to advertise as a hotel; (b) defendant was not to use bellboys; (c) defendant might use 250 apartments for transient guests but was to cease transient operations whenever the District of Columbia zoning regulations were amended to permit the operation of commercial adjuncts without a hotel license. The agreement is indicated in two letters, one dated August 15, 1952,[4] from defendant to the Assistant

[4] The text of the pertinent portion of defendant's letter to the Assistant Commissioner is as follows:

"Reference is made to our letter of August 1, 1952 addressed to Mr. Thomas C. Barringer, Director, District Insuring Office, Federal Housing Administration, Washington, D. C., wherein we request permission to provide occupancy of our project in the manner required by the District of Columbia governmental authorities so that we will be enabled legally to rent our commercial adjuncts as shown on the original drawings approved for building permit by the Building and Zoning Department of the District of Columbia and your Administration.

"Enclosed herewith you will find a copy of the applicable sections of the District of Columbia Zoning Regulations together with a copy of a letter received from the Board of Zoning Adjustment of the District of Columbia from which you will see that in order to accomplish the desired result it will be necessay for us to provide accommodations for 600 guests. As the result of numerous conferences with the District of Columbia Zoning Authorities it has been determined that the use of 250 apartments in our project for such purpose will be adequate to comply with those requirements.

"In order to induce your office to permit compliance with these District of Columbia regulations we hereby represent and agree as

Commissioner of FHA and the reply thereto dated August 22, 1952.[5] The terms of the agreement were not thereafter changed.

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follows: 1. We will not, at any time, nor in any manner, advertise our project as a 'hotel'. 2. We will not, at any time, erect any signs on or about our project designating the building as a 'hotel'. 3. We will not have any bellboys employed on or about our project. 4. We will not remove any of the kitchen equipment from the premises. 5. Rents to be charged for these accommodations will be determined by your office, subject to the review and acceptance or modification by the Rent Administrator for the District of Columbia.

"You may be assured that we will continue to use our best efforts to obtain tenant occupancy on a permanent basis."

[5] The text of the reply of the Assistant Commissioner of FHA, to the foregoing letter of defendant is as follows:

"Reference is made to your letter of August 15, 1952, in which your request that this Administration consent to the use of 250 apartments in the above identified projects for transient guests in order that the commercial adjuncts of the projects, as constructed in accordance with approved plans and specifications, may be legally used for commercial purposes in accordance with the requirements of the Board of Zoning Adjustment of the District of Columbia.

"As you know, it is not the policy of this Administration to permit any of the apartments or living units in rental projects covered by insured mortgages to be used for tansient guests but in these projects our insurance of the mortgages was predicated in part upon the use of and income from commercial adjuncts. It is hoped that you may be able to prevail upon the zoning authorities of the District of Columbia to permit the use of such commercial facilities without requiring that any of the apartments be made available for transient guests.

"We have carefully considered the contents of your letter of August 15, and attachments, and previous correspondence relative to use of the commercial facilities in the projects. In view of the fact the zoning authorities of the District of Columbia require the use of 250 apartments for transient guests as a prerequisite to use of the commercial adjuncts of the projects for commercial purposes and in view of approval of the plans and specifications by the Building and Zoning Department of the District of Columbia prior to construction of the projects, we are approving the use of 250 apartments in the projects for transient guests. This approval, however, shall be effective only so long as such transient use is required by the zoning authorities of the District of Columbia as a prerequisite to commercial use of the commercial facilities. This approval is also subject to all of the conditions of your letter of August 15 and

20. Defendant applied for and secured a hotel license, but from the outset the defendant violated its agreement, in that defendant has employed bellboys and has advertised in an effort to attract transient trade.

21. In 1954, the Board of Zoning Adjustment had under consideration an amendment to the zoning regulations which would permit some apartments to operate commercial adjuncts. This regulation was drafted by Mr. Robert O. Clouser, a member of the Board and Director of Planning for the District of Columbia. The regulation was drafted for the benefit of the defendant and another apartment known as the Berkshire. When the draft was prepared, Mr. Clouser conferred with Mr. James C. Wilkes who had been in the employ of the defendant as an attorney from the inception of the project. Mr. Wilkes suggested revising the draft for the purpose of making certain that the defendant's project would qualify and the language suggested by Mr. Wilkes was adopted by the Board of Zoning Adjustment. Under this new regulation, enacted November 3, 1954, apartment buildings are permitted to operate "commercial adjuncts for the sale of convenience commodities and services, such as the tenants' daily living needs in food, drugs, sundries and personal services". However, apartments located "less than one fourth mile walking distance from the center of the principal entrance of the apartment building to be serviced to the nearest principal business street frontage of any business district previously established and operating in a commercial zone" are not eligible under this new regulation.

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to subsequent approval by this Administration of the apartments to be used for transient guests and the rents to be charged therefor.

"With respect to the apartments to be used for transient guests and the rents to be charged therefor, we request that you immediately communicate with Mr. Thomas C. Barringer, our Director for the District of Columbia, and submit to him necessary information and proposals for consideration."

22. As soon as the regulation was passed, the defendant filed an appeal known as Appeal No. 4000 with the Board of Zoning Adjustment for permission to operate a grocery store on the premises. A grocery store could not be located in a hotel under the regulations. In preparation for the hearing on Appeal No. 4000, the defendant examined a map prepared by the Board of Zoning Adjustment which indicated a distance of 1335 feet, this being the scaled distance from The Woodner to 14th Street, along Spring Place. A draftsman in the office of the Board of Zoning Adjustment, at the defendant's request, drew another line on the map which ran from The Woodner to 14th Street, along Spring Road, and this distance was indicated to be 1545 feet. At the hearing the defendant represented that it qualified under the new regulation, and argued that the Board should find that the walking distance should be along Spring Road rather than Spring Place, since there was no crosswalk at Spring Place and 16th Street for the protection of pedestrians. After consideration, the Board of Zoning Adjustment granted the appeal. However, an order was not issued because defendant requested that its issuance be held up because it was not yet prepared to make the installation.

23. This matter came to the attention of FHA and it was concluded after a study of the regulation that the defendant now could operate all its commercial adjuncts without a hotel license. Plaintiff then requested defendant to make an application for permission to operate its commercial adjuncts under the new zoning regulation.

24. Thereupon, defendant hired an engineer to measure the distance between the principal entrance of the project and 14th Street, and notified FHA and the Board of Zoning Adjustment, that the distance was less than a quarter mile and that therefore, it could not qualify under the new ordinance.

25. Upon receiving this statement, the Board of Zoning Adjustment had its District Surveyor make an official measurement and, the distance was found to be 1324 feet.

26. The plaintiff, by virtue of the defendant's various breaches of contract, declared the agreement to be terminated, and ordered defendant on April 20, 1955 to cease its hotel and transient operations. Defendant refused, and continues to operate as an apartment hotel.

27. The defendant's failure to notify FHA of the District of Columbia's zoning regulations until such time as the building was largely completed was an act of bad faith, and was calculated to place FHA under pressure to permit transient rentals in violation of FHA policy and practices.

28. The defendant's effort to establish the jurisdiction of the Board of Zoning Adjustment under Appeal No. 4000 was in good faith, but its subsequent attempt to show lack of jurisdiction was not made in good faith, but was motivated entirely by the defendant's financial considerations.

29. Transient accommodations at The Woodner during eight months ending August 31, 1957 had a vacancy ratio of 26.9%. The non-transient accommodations for the same period reflect the vacancy ratio of 5%. There is nothing in the record to establish that the transient accommodations, if converted to non-transient accommodations, would not be fully rented.

30. Under FHA policy the furniture purchased by the defendant can be used in furnished apartments if operated on a non-transient basis. The record does not establish the amount spent by defendant for furniture now being used in the hotel operation.

31. The instant action was instituted by the Commissioner of FHA on July 11, 1955, following refusal by

defendant to cease its hotel and transient operations as ordered by the Commissioner in his letter of April 20, 1955.

Conclusions of Law

(1) The operation of a hotel is a business other than the operation of a rental housing project.

(2) The defendant's hotel operations are contrary to that provision of its charter which restricts its business activity to the operation of a rental housing project—so long as FHA insurance on mortgages on its project is outstanding.

(3) From the beginning, transient rentals were not within the scope of defendant's permitted activity under its charter except with the consent of FHA since the charter expressly declares that without FHA approval the corporation "shall not * * * require as a condition to the occupancy or leasing of any unit in the project the payment * * * of any amount other than the payment of the first month's rent" plus a specified security deposit "to guarantee the performance of the covenants of the lease." The quoted charter provision contemplates that any rental of a unit in defendant's project shall be for at least one month.

(4) Such right as defendant had to conduct transient operations in its project was dependent solely upon the permission given by FHA in the agreement of August 1952 between FHA and defendant.

(5) After the agreement of August 1952 was made it was not thereafter modified by acquiescence of the parties or otherwise.

(6) The contract of August 1952 between defendant and FHA has been substantially breached in that defendant has used bellboys and has advertised as a hotel and the contract is found to have been legally terminated by FHA.

(7) The defendant is now eligible under the new zoning regulations to operate the premises involved without a hotel license, and it was implicit in the agreement of August 1952 that in the event of such an amendment, defendant would apply for permission to operate its commercial adjuncts thereunder. The defendant's failure and refusal to apply is not made in good faith and was also a substantial violation of the agreement of August 1952, justifying plaintiff's termination of the contract.[1]

(8) The Board of Zoning Adjustment has jurisdiction to consider an appeal by the defendant under the amended zoning regulations.

(9) The method employed by the Board of Zoning Adjustment to determine the distance from the principal entrance of The Woodner to the nearest principal business street frontage, to wit, scaling the plat of the area, was reasonable and proper.[2]

(10) The method employed by the Surveyor of the District of Columbia to determine the distance from the principal entrance to the business street frontage was reasonable and proper.

(11) The prohibitions against hotel operations and transient rentals in Section 513 were (in effect) included in defendant's charter adopted in 1949, and properly so

---

[1] 3 Williston on Contracts, Revised Ed., 1936, § 841, p. 2360, Restatement, Contracts, §§ 397, 275, comment a.

[2] Ambiguous sections of zoning ordinances should be interpreted according to the intent of the enacting body. Hutchison v. Board of Zoning Appeals, 1953, 140 Conn. 381, 100 A.2d 839. Here the Zoning Commission was clear in its intent to enact a regulation that would include commercial adjuncts for The Woodner. Moreover, the Board of Zoning Adjustment is created and qualified to decide questions of fact and opinion as to zoning. Unless the Board's decision is clearly arbitrary and unreasonable, courts should not substitute their judgment for the Board's. Selden v. Capitol Hill Southeast Citizens Association, 95 U.S. App. D. C. 62, 219 F.2d 33.

in view of the purpose of Section 608 of the National Housing Act, as amended in 1946, to provide apartments during an unprecedented emergency shortage of housing and to give preference in the occupancy of the apartments to World War II veterans and their immediate families and to "hardship cases".[3] Section 513 does not, as to defendant, create a new restriction with respect to a past transaction and accordingly, this section is applicable to defendant.[4]

(12) Section 513 provides that project owners who had secured written permission to rent to transients prior to May 28, 1954, could continue to rent to transients. However, this provision was intended by Congress to confirm, not to abrogate, existing written agreements between FHA and Section 608 mortgagors, and, interpreting the section in accordance with the declared legislative intent, it did not liquidate the agreement then in effect between FHA and defendant.[5]

(13) There are no equities in favor of the defendant which commend themselves to the conclusion of this Court, it appearing that defendant engaged in a pattern of conduct which was calculated to defeat the purposes of the National Housing Act.

[3] 60 Stat. 214. And see House Report No. 1580, U. S. Code Congressional Service, 79th Congress, 2d session, 1946, p. 1157.

[4] Section 513, with certain exceptions, directs enforcement of its prohibitions against hotel and transient use "as to all existing multifamily housing with respect to which a mortgage was insured under this Act prior to August 2, 1954, as well as to all multifamily housing with respect to which a mortgage is hereafter insured under this Act." In Darlington, Inc., v. Federal Housing Administration, 142 F. Supp. 341, 154 F. Supp. 411, the court having found that neither the plaintiff's charter nor the law existing prior to 1954 prohibited rental to transients, declined to apply Section 513 retroactively.

[5] Sections of statutes should not be interpreted literally if the result would be plainly at variance with the legislative intent as a whole. United States v. American Trucking Associations, 310 U. S. 534, 543, rehearing denied, 311 U. S. 724.

(14) An injunction against use of defendant's premises for transient and hotel purposes shall issue. Counsel for plaintiff will submit a proposed decree with provisions for an appropriate stay in case of the timely filing of a notice of appeal, and also with provision for a reasonable period of transition from transient to residence use of the apartments involved.

/s/ BURNITA SHELTON MATTHEWS

June 30, 1958.

[Filed July 30, 1958]

FINAL JUDGMENT

This cause having come on for final hearing and the issues therein having been tried before the Court without a jury, and the evidence of all the parties hereto having been heard, and the case having been finally submitted, and the Court having filed its Findings of Fact and Conclusions of Law,

Now it is this 30th day of July, 1958 ordered, adjudged and decreed as follows:

I. The defendant herein, its agents, servants, successors and privies and each of them are hereby permanently enjoined and restrained, until such time as the Federal Housing Administration insurance on the mortgage loans on the project property has terminated from directly or indirectly:

A. Operating the multi-family housing project known as The Woodner and located at 3636 16th Street, N. W., Washington, D. C. for transient or hotel purposes;

B. Renting any of the units in the project for any term less than one month;

C. Charging rent for any unit in excess of the monthly rental schedule approved by the Commissioner of the Federal Housing Administration.

II. The defendant shall, on or before October 31, 1959, make the premises previously reserved for transient and hotel purposes available for residential use. The injunctive relief provided for herein shall, with respect to such premises, be temporarily suspended during the period required for such transition, that is, for the period beginning July 30, 1958 and ending October 31, 1959.

/s/ BURNITA SHELTON MATTHEWS
Burnita Shelton Matthews,
Judge

Seen:

/s/ MAX L. KANE
Max L. Kane, Attorney
Department of Justice
Attorney for Plaintiff

/s/ MARTIN J. MCNAMARA, JR.
Martin J. McNamara, Jr.
Attorney for Defendant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,773

ROCK CREEK PLAZA, INC., *Appellant*

v.

JULIAN H. ZIMMERMAN, Commissioner of Federal Housing Administration, *Appellee*

Appeal from the United States District Court for the District of Columbia

---

Decided April 30, 1959

Mr. Vincent J. Fuller, with whom *Mr. Edward Bennett Williams* was on the brief, for appellant.

Mr. Carl Eardley, Attorney, Department of Justice, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of court, with whom *Assistant Attorney General Doub* and *Messrs. Oliver Gasch*, United States Attorney, and *Alan S. Rosenthal*, Attorney, Department of Justice, were on the brief, for appellee.

Before PRETTYMAN, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges.

PER CURIAM: This action was instituted in the District Court by the Commissioner of the Federal Housing Administration (appellee) to obtain an injunction restraining the defendant (appellant), Rock Creek Plaza, Inc., from operating its project in the District of Columbia as a hotel; from renting any of the units of the project for any term less than one month until such time as the

mortgage loan insured by the Federal Housing Administration had been paid and the insurance terminated; and from charging rent for any unit in excess of the monthly rental schedule approved by the Commissioner.

After an extensive trial, the District Court filed its opinion,[1] findings of fact and conclusions of law, and judgment, granting the relief requested, and directing appellant to make all units of the project available for residential use on or before October 31, 1959. This appeal followed.

An examination of the record discloses no error. We construe the order as remaining in effect only so long as the appellant continues to enjoy the benefits of F.H.A. financing.

Affirmed

[1] *Mason v. Rock Creek Plaza, Inc.*, 164 F. Supp. 269 (D.D.C. 1958), to which reference is made for the pertinent facts.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958

C. A. 3017-55

No. 14,773

ROCK CREEK PLAZA, INC., *Appellant*

v.

JULIAN H. ZIMMERMAN, Commissioner of Federal Housing Administration, *Appellee*

Appeal from the United States District Court for the District of Columbia

Before: PRETTYMAN, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges.

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

PER CURIAM.

Dated: April 30, 1959.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 254

ROCK CREEK PLAZA, INC., PETITIONER

v.

JULIAN H. ZIMMERMAN, COMMISSIONER OF THE FEDERAL HOUSING ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Columbia (Pet. App. 1a-16a) is reported at 164 F. Supp. 269. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 18a-19a) is reported at 266 F. 2d 695.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1959 (Pet. App. 20a). The petition for

a writ of certiorari was filed on July 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In 1952, the Federal Housing Administration authorized petitioner's FHA-insured housing project to use a limited number of its units for transient purposes, subject to certain conditions. When petitioner violated these conditions, the FHA terminated the agreement. The question presented is whether Section 513 of the National Housing Act, added in 1954, conferred the right on petitioner to rent those facilities to transients without regard to, and in violation of, the specified conditions.

STATUTE INVOLVED

Section 513 of the National Housing Act, as added, 68 Stat. 610, 12 U.S.C. 1731b, provides in pertinent part:

> (a) Intent of Congress.
>
> The Congress declares that it has been its intent since the enactment of this chapter that housing built with the aid of mortgages insured under this chapter is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.
>
> (b) Exceptions to prohibition.
>
> Notwithstanding any other provisions of this chapter, no new, existing, or rehabilitated multi-

family housing with respect to which a mortgage is insured under this chapter shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis).

STATEMENT

The Federal Housing Commissioner brought this action to enjoin petitioner from operating its multi-family housing project as a hotel, from renting any of the project units for any term less than one month until such time as the Federal Housing Administration (FHA)-insured loans on the project have been paid off, and from charging rent for any unit in excess of the monthly rental schedule approved by the FHA.

The facts, as found by the district court and not challenged here, may be summarized as follows: in February 1949, petitioner filed applications for mortgage insurance under Section 608 of the National

Housing Act, as amended, 12 U.S.C. 1743, for two projects, each described as an "eight story apartment" with more than 500 "family units" to be located at 3616 - 16th Street, Northwest, Washington, D.C.[1] The FHA issued commitments of insurance to the proposed mortgagee in March 1949.

As required by the FHA, petitioner adopted a charter under the terms of which petitioner's business activities were limited to the construction and operation of rental housing projects as long as an FHA-insured mortgage encumbered the properties (Pet. App. 4a). This limitation was consistent with the FHA interpretation of the National Housing Act as precluding the insuring of projects which were to be used for transient rentals (Pet. App. 5a).[2]

After petitioner obtained an excavation permit from the District of Columbia, it commenced excavation with the FHA's consent (Pet. App. 5a-6a). Under FHA practice, however, no advances to petitioner could be insured until petitioner also obtained a building permit from local authorities for the construction of an apartment. Accordingly, in May 1949, petitioner sought District of Columbia permis-

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[1] As subsequently constructed, the two apartment projects are separated by a one-inch strip of caulking compound, but are operated as a single unit known as the "Woodner" (Pet. App. 4a).

[2] Commencing in 1938, the FHA issued directives to its field officers, prohibiting transient rental in FHA projects (Pet. App. 5a). The validity of the administrative construction of the statute was recently sustained by this Court in *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84.

sion to construct an apartment building. Plans furnished with the application indicated that petitioner intended to use certain space within the building for commercial adjuncts (Pet. App. 6a).

Under the then existing District of Columbia zoning regulations, a hotel license was required for accommodations which had such commercial adjuncts. Some time after its submission, petitioner's application was therefore revised to show that the building was to be used for an apartment-hotel. A supplemental application for a building permit was filed also showing that the building was to be used for an apartment-hotel (Pet. App. 6a). Notwithstanding the change in the application, the District of Columbia issued a building permit for an apartment, rather than an apartment-hotel. On the basis of the permit, the FHA endorsed the loan for insurance (Pet. App. 7a).

The first indication to the FHA of petitioner's intention to conduct a hotel operation came in the summer of 1951 when the FHA local director was informally advised that petitioner had hired a hotel manager. At that time, the local director advised petitioner that FHA-insured hotel facilities and services were not contemplated under the National Housing Act. Not until January 1952, when petitioner's project was nearing completion, did it advise the FHA of its intent to operate as a hotel and of the necessity of securing a hotel license if the commercial adjuncts, which had been included in the original application to the FHA, were to be used. The FHA did not previously know of the District of Columbia zoning

requirement for a hotel license for housing accommodations containing commercial adjuncts (Pet. App. 7a).

While the FHA at first refused to permit petitioner to engage in transient rentals, in August 1952 the FHA changed its position and entered into an agreement with petitioner permitting the petitioner to use 250 apartments for transient guests. The agreement between petitioner and the FHA provided that petitioner would not advertise as a hotel, would not use bellboys, and would not remove any kitchen equipment from the premises (Pet. App. 8a-9a). It was further agreed that the approval of transient rentals "shall be effective only so long as such transient use is required by the zoning authorities of the District of Columbia as a prerequisite to commercial use of the commercial facilities" (Pet. App. 9a). Thereafter, petitioner applied for and secured a hotel license from the District of Columbia (Pet. App. 10a).

From the outset of its operation of the project, petitioner violated its agreement by employing bellboys and by advertising in an effort to attract transient trade (Pet. App. 10a). Moreover, the petitioner also violated the agreement of August 1952 by failing to apply to the District of Columbia in good faith for permission to operate its commercial adjuncts without a hotel license (Pet. App. 12a), after the relevant zoning regulation was revised in 1954 (Pet. App. 10a). The revised regulation, which had been drafted for the benefit of the Woodner and another apartment, with the assistance of an attorney who had been in petitioner's employ from the beginning

of the project, permitted apartment buildings to operate commercial adjuncts such as those in the Woodner (Pet. App. 10a).

The FHA declared the agreement terminated because of petitioner's breaches of contract and, on April 20, 1955, ordered petitioner to cease its hotel and transient operations (Pet. App. 12a). After the refusal of petitioner to comply with this order, the present suit was instituted (Pet. App. 12a-13a).

The district court held that petitioner's right to use its project for transient rentals was dependent solely upon the permission given by the FHA in the August 1952 agreement, since the original charter prohibited all transient rentals (Pet. App. 13a). Moreover, Section 513(b) of the National Housing Act, *supra*, pp. 2-3, provided that only owners who had secured permission to rent to transients from the FHA before May 28, 1954, could continue to rent to transients. The court concluded that this section was intended by Congress to confirm existing agreements between the FHA and mortgagors under the Act and was not intended to create rights beyond those agreed to contractually by the FHA in this manner (Pet. App. 14a-15a). But the court found that the agreement had been substantially breached in that petitioner (1) had used bellboys; (2) had advertised as a hotel; and (3) had failed and refused to seek permission under the new zoning regulations to operate the premises involved without a hotel license[3] (Pet. App. 13a-14a). Accordingly, the court

[3] The court found that petitioner's failure to notify the FHA of the District of Columbia zoning regulations until

determined that the FHA had justifiably terminated the contract, leaving petitioner without any legal right to make transient rentals (Pet. App. 13a-14a). The district court, therefore, granted the injunctive relief sought by the FHA, prohibiting petitioner from operating the project for transient or hotel purposes for as long as the mortgage loans on the project are FHA-insured and requiring petitioner to make the premises previously reserved for transient and hotel purposes available for residential use on or before October 31, 1959 (Pet. App. 16a-17a).

The court of appeals, in a *per curiam* opinion, affirmed the decision of the district court (Pet. App. 18a-19a).

ARGUMENT

The sole contention of petitioner in this Court is that under the terms of Section 513(b) of the National Housing Act, *supra*, pp. 2-3, which was added in 1954, it is now free to operate its project for transient or hotel purposes in complete disregard of any of the conditions contained in its agreement with the FHA in 1952, except that condition limiting the

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the Woodner was almost completed "was an act of bad faith" "calculated to place FHA under pressure to permit transient rentals" (Pet. App. 12a) and that its failure and refusal to seek permission under the new zoning regulations to operate as an apartment building was "not made in good faith" (Pet. App. 14a; see Pet. App. 12a). Since petitioner was "engaged in a pattern of conduct which was calculated to defeat the purposes of the National Housing Act," the court concluded that "There are no equities in favor of" petitioner (Pet. App. 15a).

number of rooms which can be used for transients. By this line of argument, petitioner seeks to escape the unchallenged holdings of the courts below that the petitioner violated the terms of its 1952 agreement with the FHA, pursuant to which the FHA gave petitioner conditional permission to use up to 250 units for transient accommodations. It is plain, we submit, that the courts below were correct in rejecting this contention. Moreover, there is no conflict of decisions. Accordingly, further review by this Court is not warranted.

The premise underlying petitioner's argument is that Section 513(b) of the National Housing Act was intended to place on a parity with hotels those projects under Section 608 of the National Housing Act (12 U.S.C. 1743) which had received permission to make transient rentals on a limited basis. The language of Section 513, as well as its legislative background, shows to the contrary that the purpose of the section was to make it clear that the National Housing Act never contemplated the financing of hotels, motels, or other transient facilities. See *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84. Indeed, its legislative history makes it clear that Section 513 resulted from complaints of representatives of the hotel industry that many Section 608 rental housing projects were catering to transients in competition with hotels. See *Hearings Before the House Committee on Banking and Currency on H.R. 7839*, 83rd Cong., 2d Sess., pp. 507-515; *Hearings Before the Senate Committee on Banking and Currency on S. 2889, 2938, 2949*, 83rd Cong., 2d Sess., pp. 654-661. While the committees of both

Houses of Congress agreed that it had never been contemplated that an FHA-insured project could provide transient accommodations, it was also agreed that Congress should clarify its intent by expressly prohibiting transient occupancy. See H. Rept. No. 2271, 83rd Cong., 2d Sess., pp. 77-78. Thus, in Section 513(a), *supra*, p. 2, Congress specifically declared that, since the enactment of the National Housing Act, it had been the legislative purpose "that housing built with the aid of mortgages insured under the Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding." Recognizing, however, that in a few instances mortgagors had, prior to 1954, applied for and received permission from the FHA to rent to transients, Congress in Section 513(b) carved out an exception to the prohibition against transient rentals in order to preserve the privileges which the FHA (perhaps erroneously) had purported to grant.

There is nothing in Section 513(b) to suggest that, notwithstanding the general congressional purpose to eliminate the practice of transient rentals, mortgagors in petitioner's situation now enjoy a *greater* latitude to engage in that practice than had been previously sanctioned either by the National Housing Act or by his contract with the FHA. Moreover, petitioner's contention that Section 513(b) was designed to place it (and other Section 608 mortgagors who had received permission to rent to transients prior to May 28, 1954) on a complete parity with hotels is, of

course, negated by the provision in Section 513(b) limiting the number of accommodations available for transients to the number previously approved by the FHA.

In short, after, as well as before, the enactment of Section 513, petitioner's right to rent to transients was dependent upon the agreement between it and the FHA, and was subject to the conditions therein. Since, as the district court found, petitioner flagrantly violated the conditions imposed by the FHA, petitioner's contractual right to rent to a limited number of transients expired. The FHA was therefore entitled to the injunctive relief which was granted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

ALAN S. ROSENTHAL,
PETER H. SCHIFF,
Attorneys.

AUGUST 1959.

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